Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

NICHOLAS J. BOROFF,
Petitioner,

-vs-

VAN WERT CITY BOARD OF EDUCATION, JOHN BASINGER, WILLIAM CLIFTON, and DAVID FROELICH,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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62 pp

QUESTIONS PRESENTED

Does the First Amendment to the U.S. Constitution, as applied to a public school through the Fourteenth Amendment, forbid public school officials from banning a student from wearing a T-shirt with a message which is contrary to the religious beliefs held by the majority of its students, or its administrators?

What constitutes 'vulgar or offensive' speech that public school officials can ban pursuant to *Bethel School District No. 403 v. Fraser*?

PARTIES TO THE PROCEEDING

Petitioner is Nicholas J. Boroff, who was the plaintiff in the district court and the appellant in the Sixth Circuit Court of Appeals.

Respondents are Van Wert City Board of Education, John Basinger, William Clifton, and David Froelich, who were the defendants in the district court and the appellees in the Sixth Circuit Court of Appeals.

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Nicholas J. Boroff by counsel respectfully petitions this Court to issue a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit Opinion (Appendix A) is reported at *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (2000). The district court opinion (Appendix B) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on July 26, 2000. No petition for rehearing or en banc consideration was filed; neither is required under Sixth Circuit Court of Appeals Local Rule 35(b) for a litigant to petition for a writ of certiorari.

The jurisdiction of the U.S. Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the U.S. Constitution as made applicable to local governments, including public schools, by the Fourteenth Amendment to the U.S. Constitution. Redress was sought pursuant to 42 U.S.C. §1983.

The First Amendment states in pertinent part:

"Congress shall make no law. . .abridging the freedom of speech. . ."

The Fourteenth Amendment states in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983 states in pertinent part:

"Every person who, under color of any. . .regulation, custom, or usage, . . .subjects. . .any citizen of the United States. . .to the deprivation of any rights, privileges, or immunities secured by the Constitution. . .shall be liable to the party injured. . ."

STATEMENT OF THE CASE

1. Procedural History

Plaintiff Ellen Boroff filed a complaint on September 16, 1997 in the U.S. District Court for the Western Division of the Northern District of Ohio, as the guardian and next friend of Nicholas J. Boroff. Jurisdiction was pursuant to 28 U.S.C. §1331. The same day she also requested preliminary injunctive relief. After briefing, the district court denied this request on October 15, 1997.

Plaintiff moved for summary judgment on liability on May 1, 1998. All Defendants filed their cross motions for summary

judgment on May 11, 1998. After various responses and replies on both of these motions, the court granted the summary judgment motion to Defendants July 6, 1998. Plaintiff filed a Notice of Appeal and a Jurisdictional Statement July 27, 1998. Jurisdiction was pursuant to 28 U.S.C. §1291.

While the case was pending, Nicholas J. Boroff reached the age of majority. Hence he moved to substitute himself as the plaintiff, and the Sixth Circuit Court of Appeals granted his motion on October 5, 1998. He will henceforth be referred to as such, even for events which happened prior to the substitution.

The Sixth Circuit Court of Appeals, in a 2-1 decision, affirmed the district court's judgment for Respondents. This was entered on July 26, 2000. No petition for rehearing or en banc consideration was filed.

2. Statement of the Facts

This case regards one native Ohioan's attempt to wear T-shirts at his school depicting another native Ohioan, Brian Warner, now known as Marilyn Manson, the king of shock rock.

Nicholas J. Boroff (Boroff henceforth) was a seventeen-year-old high school senior at Van Wert High School (school henceforth), Van Wert, Ohio. On Friday, August 29, 1997 Boroff was wearing a T-shirt for the rock group "Marilyn Manson". The shirt was in no way obscene. John Basinger, the school superintendent, William Clifton, the school principal, and David Froelich, the principal's chief aide (administrators henceforth), told

him he could not wear this T-shirt at school and he would have to turn it inside out or leave.

Boroff left school that day. The next day of school was Thursday, September 4, and again Boroff wore a "Marilyn Manson" T-shirt, and his mother went to School and met with the administrators. They again stated that Boroff could attend school, but could not wear the "Marilyn Manson" T-shirt. Again, Boroff left school that day.

On September 5, 1997, September 8, 1997, and September 9, 1997 Boroff attempted to attend school wearing a different "Marilyn Manson" T-shirt, and was told each day by one of the administrators to leave. He complied with the order to depart. On September 10, 1997, September 11, 1997, September 12, 1997, and September 15, 1997, Boroff's father called the school and said that his son would not be attending because of the T-shirt situation.

Descriptions of five of the T-shirts are attached at Appendix C, page 36a. A photograph of the one which is legally distinct from the others, as *infra*, being the 'Jesus' T-shirt, is attached at Appendix D, page 37a.[1]

The three administrators have stated that the "Marilyn Manson" T-shirts are not allowed because they are "immoral", "Satanic", "against the standards of the community", "Proclaims self

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[1]The words on the front of this shirt at the bottom are difficult to read. These are, "See No Truth - Hear No Truth - Speak No Truth." The two words at the top are "Marilyn Manson."

to be the anti-Christ and he's not having it in his house", "offensive", and that it was a school board decision. They also told Boroff that he would be allowed to attend school provided he did not wear a "Marilyn Manson" T-shirt.

The prior school year, Boroff frequently wore "Marilyn Manson" T-shirts to school, and it caused no disruption in any way of school. All Respondents allow students to attend school wearing T-shirts with names of rock and roll groups other than "Marilyn Manson", many of which are indistinguishable in nature from the forbidden ones. Finally, the prohibition on "Marilyn Manson" was not uniformly enforced, as another student regularly displayed patches of this group on her backpack at school.

On the summary judgment motions, Principal Clifton submitted an affidavit containing the following:

> "I have found the T-shirt which contains the three-faced Jesus to be offensive. . .This T-shirt is offensive because it mocks a major religious figure. Mocking any religious figure is contrary to our educational missions which is to be respectful of others and others' beliefs. Second, mocking this particular religious figure is particularly offensive to a significant portion of our school community, including students, teachers, staff members, and parents."

Appendix A, page 15a. Other facts appear as necessary.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Conflicts with Decisions of the Supreme Court.

The district court and the Sixth Circuit Court of Appeals each identified the three leading Supreme Court cases in this matter: *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 683 (1986), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). The expressive rights of a student in a public school are not identical to those of a citizen engaging in public discourse, as per the district court:

> ". . .First, under *Tinker*, speech that is neither vulgar nor school-sponsored may be prohibited only if it causes a substantial and material disruption of the school's operation. Second, under *Fraser*, vulgar or offensive speech may be prohibited without showing a showing of disruption or substantial interference with the school's work. Third, under *Kuhlmeier*, school-sponsored speech may be restricted when the limitation is reasonably related to legitimate educational concerns."

Appendix B, pages 30a-31a. These three cases must serve as the parameters for any school-related free speech issue.

A. The Respondents' decision that the T-shirts were vulgar or offensive was manifestly unreasonable.

There is no contention that the speech at issue here is school-sponsored. Hence, while *Kuhlmeier* has some applicability, it is rather minimal. One way to analyze this is to first determine whether the speech is 'vulgar or offensive'. If it is, then *Fraser* allows banning it, and the analysis is complete, subject to an exception if there was viewpoint discrimination. Otherwise, apply *Tinker* and examine if there is a threat of substantial disruption such that would allow the school to ban the speech.

The district court similarly dealt with the other intertwined issue: who gets to determine what is 'offensive'? It held that this was the primary province of school administrators:

> ". . .the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."

Appendix B, page 32a, citing *Kuhlmeier*, 484 U.S. at 273. It further held that it will only review such a decision for whether the administrators' decision was manifestly unreasonable.

The district court, after reviewing the T-shirts, ruled that the administrators' decisions that the T-shirts were offensive were not manifestly unreasonable. The Sixth Circuit expressly affirmed this. Appendix A, page 10a. Essentially, both courts held the T-shirts

more like Cohen's[2] jacket than Tinker's armbands. Boroff respectfully requests that this Court grant this petition so that it can then, among other things, overturn this determination.

Any reviewing court must carefully examine the sincerity of Respondents in making their decision. If courts cannot make this inquiry, then all expressive conduct at any school could be suppressed, provided the administrators are prepared to chant the mantra, "it was offensive."

Begin by defining 'vulgar' and 'offensive'. There are several definitions of the word 'vulgar'. The one given that is meant from the context of *Fraser* is "lewdly or profanely indecent: OBSCENE" *Webster's New Collegiate Dictionary*, 1314 (Merriam 1977). 'Offensive' is defined as "giving painful or unpleasant sensations: NAUSEOUS, OBNOXIOUS" *Id.* at 797.[3] Boroff respectfully submits that, whether the viewer is an adult or a high school student, he or she will not undergo painful or unpleasant sensations when seeing him in one of the T-shirts at issue.

The T-shirts in question are nowhere near Cohen's jacket in terms of offensiveness. They contain no obscenities. Any person basically ignorant regarding music listened to by teenagers would be unable to discern any difference between the allowed T-shirts and the disallowed 'Marilyn Manson' T-shirts.

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[2]*Cohen v. California*, 403 U.S. 15 (1971).

[3]Emphasis in all of the paragraph original.

Further, one must examine Cohen's jacket in reviewing the lower courts' decision. That jacket had an inscription, "Fuck The Draft". There is absolutely no question that a school could forbid a student from wearing clothing with the word "Fuck" on it. But note that it *could* forbid, rather than *must* forbid. While counsel, as a parent, would have a lot of problems with a school that allowed such clothing, there would be no cause of action that could be brought in such an instance.

However, Boroff respectfully submits that a school could not allow a shirt which read, "Fuck A" and then forbid a shirt which read, "Fuck B". Each shirt would be equally offensive, but by allowing the former the school would be implying that the use of such term is not unacceptably offensive, and therefore the restriction on the latter would not be protected by *Fraser*. Hence, the restriction would then be judged under *Tinker*, and in all likelihood not stand.[4]

Further, Boroff submitted evidence that Respondents allow other T-shirts that are materially indistinguishable from those at issue here. Most of these are rock band shirts, for groups including such as Slayer and Megadeath, many of which are basically indistinguishable from the ones Boroff was not allowed to wear. Therefore, their claim that the 'Marilyn Manson' T-shirts are offensive is belied by their actions in allowing the other T-shirts.

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[4]The school administrators in such circumstance still might be able to show that the message in one would be 'substantially and materially disruptive', and not in the other.

The district court disagreed with this analysis. It held that schools do not and should not expect their students to view things without regard to the culture of the locale. Appendix B, pages 33a-34a. Nicholas respectfully submits that the district court erred in doing so. While there is evidence that Marilyn Manson has extolled drug use and Satanism, to conclude that to allow this person's name and picture in school is therefore 'offensive and vulgar' is untenable. It begs the question.

It further does not follow the dictionary definitions, *supra*, of these terms. The definition of 'offensive' relies on the viewer having an adversely visceral reaction to the message. When the reaction relies on the cultural capital of the viewer, it is necessarily an intellectual rather than visceral reaction, and hence cannot by definition be 'offensive'.

Boroff submitted evidence that he wore 'Marilyn Manson' T-shirts the prior school year without incident. Hence, absent evidence of a change in the sensibilities of the Van Wert community, Respondents' contention that the shirts are just overly offensive cannot be taken seriously. Further, as *infra* at C., any claim of disruptiveness pursuant to *Tinker* must fail.

Indeed, all the administrators freely admit that their proscriptions are directed solely at Marilyn Manson. Again, all concerned would concede that such a general ban could not exist in society at large, but at a public school is a different matter. However, such an ability to ban is not unfettered by the First Amendment.

To reiterate, the district court held that *Fraser* was the controlling precedent, because the school administrators deemed it 'offensive' and that decision was not manifestly unreasonable. Boroff respectfully disagrees and contends that it is distinguishable. In *Fraser*, in response to a sexually suggestive speech given by a student at a school assembly, the Supreme Court upheld the school disciplining the student, holding

> "Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. . .nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of schools'."

Fraser, 478 U.S. 675, 683 (1986). However, this case recognizes the concerns of parents and school administrators in keeping children from sexually explicit, indecent, or lewd speech. *Id.*, 478 U.S. at 684. These concerns are not present in the case at bar, as there is nothing sexually explicit, indecent, or lewd about the T-shirts in question. While Boroff's message is not perhaps as purely political as the students in *Tinker*, it is far closer to that than it is to the message in *Fraser*, which was laden in sexual innuendo, to credit the student there with more surreptitiousness than to which he is probably entitled.

It is important to examine the policies that the U.S. Supreme Court was weighing in *Fraser* in determining just how to apply it. It held that

> "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."

Fraser at 681. Boroff was wearing a T-shirt. This is an accepted method of disseminating one's views in the school setting, or indeed in society at large. As such, he conformed with the 'boundaries of socially appropriate behavior', as per *Fraser*. He was using this accepted method to 'advocate unpopular and controversial views in schools', again as per *Fraser*. That this Court explicitly wrote was constitutionally protected.

The district court's concerns about unnecessarily intruding on administrators' decisions regarding the operation of schools are legitimate. But as per *Tinker* at 506, students do not shed their First Amendment rights at the schoolhouse gate. The limitation imposed by Respondents is content based but not due to an objective measure of offensiveness, and hence illegal.

B. The Respondents engaged in illegal viewpoint discrimination and hence violated Boroff's free speech rights.

The district court, and the majority on the Sixth Circuit Court of Appeals panel, failed to analyze the matter of viewpoint discrimination. And from Principal Clifton's sworn statement recounted at page 5, *supra*, Respondents infringed upon Boroff's free speech rights on the basis of his viewpoint, namely, speaking out against organized Christianity.

As per the dissenting opinion in the Sixth Circuit Court of Appeals,

> "[V]iewpoint discrimination. . .is accompanied by an all-but-irrebuttable presumption of unconstitutionality. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29 (1995) (describing viewpoint discrimination as "an egregious form of content discrimination" and observing that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . .")"

Appendix B, page 16a. As per the analysis at page 9 of this petition, viewpoint discrimination of this sort would be illegal even if the both viewpoints could be banned as 'vulgar and offensive' pursuant to *Fraser*.

Principal Clifton as *supra* dealt specifically with the three-headed Jesus shirt. He found that it mocked a major religious figure important to a large portion of the student body. Thus, it is contrary to the mission of instilling respect for other's beliefs. Which statement implies, as pointed out by the dissenting judge in the Sixth Circuit, that if the "shirt had depicted Jesus in a positive

light, it would not have been considered 'offensive.'" Appendix B, page 16a.

Of all the T-shirts at issue, the 'Jesus' one is the one that must be allowed. It has the most meaning of the six: consider that perhaps you have not been told the truth about organized religion.[5] Schools, absent a strict uniform policy, allow T-shirts extolling the virtues of religion. To then not allow T-shirts questioning the virtues of religion violates the First Amendment.

C. The Respondents violated Boroff's First Amendment rights when they forbade him to wear 'Marilyn Manson' T-shirts at school, as such would not materially disrupt the school.

However, once the issue of offensiveness is resolved in Boroff's favor, then the controlling case is, again, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). In that case, some students wanted to wear black armbands to school to protest the United States' participation in the Vietnam conflict. School officials barred them from doing so.

After the district court ruled for the school officials dismissing complaint, the Court of Appeals affirmed. The U.S. Supreme Court reversed, holding that the wearing of the armbands was close to 'pure speech', and there was no evidence of any imminent disruption by the wearing of the armbands.

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[5]Which is not to state that the other five have no meaning, even if it is simply that Boroff likes Marilyn Manson's music.

> "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'
>
> "The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."

Tinker at 393 U.S. 507-8.

School officials seeking to suppress non-offensive speech have a heavy burden: at a minimum, they must show that allowing the expression as sought by Boroff would, 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.' *Tinker* 393 U.S. at 509, citation omitted. Given the evidence that he wore the T-shirts in the 1996-97 school year without incident, there is little chance that Respondents are going to be able to sustain this burden. At a bare minimum, Boroff has created an issue of material fact as to whether such posed

a substantial risk of disruption. Indeed, none of the school administrators presented any evidence to the district court as to any changes in the culture of Van Wert, Ohio such that would have prevented that court from granting Boroff summary judgment on this issue.

II. The Question presented is important.

This case concerns ". . .the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished. . ." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). As this Court recently held,

> "Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control."

United States v. Playboy Entertainment Group, Inc., 529 U.S. ___, slip opinion at 13 (2000). Boroff respectfully submits that Respondents have restricted his speech because of its content. It is rare that such a regulation is permissible. *Id.*

Boroff, unlike the administrators and Board, lacks the ability to convene school assemblies. He, unlike the administrators and Board, has scant power to make other students listen to him. When

he wears a T-shirt, though, he can convey a message that others can see, at least for the moment. This is the extent of his First Amendment powers, and this mode is accepted as discourse in schools. Respondents illegally deprived him of this ability, in the forum in which he could reach the greatest number of persons.

CONCLUSION

For all the reasons stated, this Court should issue a writ of certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NICHOLAS J. BOROFF,
Plaintiff-Appellant,
Case No. 98-3869

-vs-

VAN WERT CITY BOARD OF EDUCATION, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Ohio at Toledo.
No. 3:97 CV 7622 - David A. Katz, District Judge.

Submitted: March 10, 2000

Decided and Filed: July 26, 2000

Before: WELLFORD, SILER, and GILMAN, Circuit Judges.

OPINION

HARRY W. WELLFORD, Circuit Judge. After Van Wert (Ohio) High School administrators told Nicholas Boroff that he was not allowed to wear "Marilyn Manson" T-shirts to school, Boroff's mother initiated this action on his behalf pursuant to 42 U.S.C. § 1983, alleging that the administrators' refusal to let him wear the T-shirts

violated his rights under the First and Fourteenth Amendments. The district court entered summary judgment in favor of the Van Wert City Board of Education and each of the school administrators who were named as defendants. We **AFFIRM** the decision of the district court.

I. BACKGROUND

This dispute arises out of a high school student's desire to wear "Marilyn Manson" T-shirts to school, and the school's opposing desire to prohibit those T-shirts. Marilyn Manson is the stage name of "goth" rock performer Brian Warner, and also the name of the band in which he is the lead singer. See Encarta World English Dictionary (2000) <">http://dictionary.msn.com/find/entry.asp?search=goth> (defining "goth" as "a style of popular music that combines elements of heavy metal with punk" and also "a style of fashion . . . characterized by black clothes, heavy silver jewelry, black eye make-up and lipstick, and often pale face make-up"). Band members take the first part of their stage names from a famous model or celebrity, such as Marilyn Monroe, Madonna, or Twiggy, and the second part from a notorious serial killer, such as Charles Manson, John Wayne Gacy, or Richard Ramirez. Marilyn Manson (the individual) is popularly regarded as a worshiper of Satan, which he has denied. See Neil Strauss, Stage Fright, Rolling Stone, June 26 1997, at 20. He is also widely regarded as a user of illegal drugs, which he has not denied. In fact, one of his songs is titled "I Don't Like the Drugs (But the Drugs Like Me)." See David Brown, 1998: The Best and Worst/Music, Entertainment Weekly, Dec. 25, 1998, at 140; see also Gina Vivinetto, Marilyn Manson, Not Kinder, Not Gentler, St. Petersburg Times, Mar. 26 1999, at 23 (reporting that Manson no longer stores his drugs and drug paraphernalia in lunch boxes because "everyone . . . is carrying their paraphernalia that way. Too trendy").

On August 29, 1997, Boroff, then a senior at Van Wert High School, went to school wearing a "Marilyn Manson" T-shirt. The front of the T-shirt depicted a three-faced Jesus, accompanied by the words "See No Truth. Hear No Truth. Speak No Truth." On the back of the shirt, the word "BELIEVE" was spelled out in capital letters, with the letters "LIE" highlighted. Marilyn Manson's name (although not his picture) was displayed prominently on the front of the shirt.[1] At the time, Van Wert High School had in effect a "Dress and Grooming" policy that provided that "clothing with offensive illustrations, drug, alcohol, or tobacco slogans . . . are not acceptable." Chief Principal's Aide David Froelich told Boroff that his shirt was offensive and gave him the choice of turning the shirt inside-out, going home and changing, or leaving and being considered truant. Boroff left school.

On September 4, 1997, which was the next school day, Boroff wore another Marilyn Manson T-shirt to school. Boroff and his mother met that day with Froelich, Principal William Clifton, and Superintendent John Basinger. Basinger told the Boroffs that students would not be permitted to wear Marilyn Manson T-shirts on school grounds. Undaunted, Boroff wore different Marilyn Manson T-shirts on each of the next three school days, September 5, 8, and 9, 1997. The shirts featured pictures of Marilyn Manson, whose appearance can fairly be described as ghoulish and creepy. Each day, Boroff was told that he would not be permitted to attend school while wearing the T-shirts.

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[1]Though the origin of the T-shirt is unknown, the distorted portrayal of Jesus seems to have been created in an effort to illustrate the band's hit album "AntiChrist Superstar."

Boroff did not attend school for the next four days following September 9, 1997. On the fifth day, September 16, 1997, his mother initiated the present suit in the United States District Court for the Northern District of Ohio, alleging that the administrators' refusal to allow her son to wear Marilyn Manson T-shirts in school violated his First Amendment right to free expression and his Fourteenth Amendment right to due process. (After his eighteenth birthday, Boroff was substituted for his mother as the plaintiff.) The complaint named as defendants the Van Wert City Board of Education, Chief Principal's Aide Froelich, Principal Clifton, and Superintendent Basinger (collectively, the School). Boroff requested a temporary restraining order and moved for a preliminary injunction. The district court, following a hearing on September 16, 1997, denied both. Following discovery, both Boroff and the School moved for summary judgment. In a memorandum and order dated July 6, 1998, the district court entered summary judgment in favor of the School. This appeal followed.

II. ANALYSIS

A. Standard of Review

We review de novo a district court's decision to grant or deny summary judgment. See *Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio*

Corp., 475 U.S. 574, 587 (1986). The judge is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A genuine issue for trial exists when there is sufficient "evidence on which the jury could reasonably find for the non-moving party." Id. at 252.

B. First Amendment Claim

"It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). While students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), the First Amendment rights of students in the public schools must be "applied in light of the special characteristics of the school environment." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting Tinker, 393 U.S. at 506). With those precepts in mind, we apply the *Tinker-Fraser-Kuhlmeier* trilogy to the facts of this case.

In *Tinker*, a few students wore black armbands to school "to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." *Tinker*, 393 U.S. at 514. The school prohibited the armbands and suspended any student who was found wearing them. The Supreme Court held that the school's actions violated the students' freedom of speech. The Court noted that "[t]he problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment. . . .

Our problem involves direct, primary First Amendment rights akin to 'pure speech.'" *Id.* at 507-08. The Court concluded that to justify the prohibition of a particular expression of opinion, the school must "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. The prohibition of the armbands, the Court held, could not be sustained without showing that engaging in the prohibited conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

Several years later, in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), the Court "cast some doubt on the extent to which students retain free speech rights in the school setting." *Baxter v. Vigo County School Corp.*, 26 F.3d 728, 737 (7th Cir. 1994). In Fraser, the Court held that a school district acted within its permissible authority in disciplining a student who gave an offensively lewd and indecent speech at a school assembly. In reaching its conclusion, the Court noted "[t]he marked distinction between the political 'message' of the armbands in Tinker and the sexual content of respondent's speech in this case." *Fraser*, 478 U.S. at 680. The Court recognized "that the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings." *Id.* at 682. It distinguished *Tinker* because the vulgar and offensive speech at issue was "unrelated to any political viewpoint." *Id.* at 685. The Court ultimately held that the school district had the authority to determine that the vulgar and lewd speech at issue would undermine the school's basic educational mission. *Id.*

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court echoed its position in *Fraser* that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission . . . even though the government could not censor similar speech outside the school.'" *Kuhlmeier*, 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 685). In *Kuhlmeier*, the Court held that the school district in that case did not violate the First Amendment by exercising editorial control over the content of student speech in a school-sponsored publication "so long as [the school's] actions are reasonably related to legitimate pedagogical concerns." Id. at 273. The Court distinguished between the First Amendment analysis applied in *Tinker* and the analysis applied in *Fraser*, noting that the decision in *Fraser* rested on the vulgar and offensive character of the speech, whereas *Tinker* rested on the propensity of the speech materially to disrupt classwork or involve substantial disorder. Id. at 271 n.4.

The district court below determined that the rule in *Fraser* applied to this case, concluding that "[a] school may prohibit a student from wearing a T-shirt that is offensive, but not obscene, on school grounds, even if the T-shirt has not been shown to cause a substantial disruption of the academic program." The court then held that the School did not act in a manifestly unreasonable manner in finding the T-shirts offensive and in enforcing its dress code.

In this appeal, Boroff argues that the district court erred in granting summary judgment to the School. In his appellate brief he maintains: The way to analyze this is to first determine whether the speech is 'vulgar or offensive'. If it is, then *Fraser* allows banning it, and the analysis is complete. Otherwise, apply *Tinker* and examine if there is a threat of substantial disruption such that would allow the school to ban the speech. Appellant's Brief at 8. Boroff claims that the

administrators' decision that the T-shirts are offensive was manifestly unreasonable and unsupported by the evidence. Boroff relies to a great extent on evidence that similar T-shirts promoting other bands, such as Slayer and Megadeth, were not prohibited, and also on evidence that one other student was not prohibited from carrying a backpack that donned three "Marilyn Manson" patches. Because the T-shirts were not "offensive," Boroff reasons, and because there is no evidence that a substantial disruption would arise from his wearing the T-shirts, then the School violated his First Amendment rights. We disagree.

The standard for reviewing the suppression of vulgar or plainly offensive speech is governed by *Fraser, supra*. See *Chandler v. McMinnville School District*, 978 F.2d 524, 529 (9th Cir. 1992) (finding that school buttons containing inoffensive terms may not be prohibited absent a showing of a reasonable forecast of substantial disruption in school activities). The School in this case, according to the affidavit of Principal Clifton, found the Marilyn Manson T-shirts to be offensive because the band promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school. Specifically, Clifton found the "three-headed Jesus" T-shirt to be offensive because of the "See No Truth. Hear No Truth. Speak No Truth." mantra on the front, and because of the obvious implication of the word "BELIEVE" with "LIE" highlighted on the back. The principal specifically stated that the distorted Jesus figure was offensive, because "[m]ocking any religious figure is contrary to our educational mission which is to be respectful of others and others' beliefs." The other T-shirts were treated with equal disapproval. Clifton went on to explain the reasoning behind the School's prohibition of the T-shirts generally:

> 17. Although I do not know if [Boroff] intends to communicate anything when wearing the Marilyn Manson t-shirts, I believe that the Marilyn Manson t-shirts can reasonably be considered a communication agreeing with or approving of the views espoused by Marilyn Manson in its lyrics and those views which have been associated to Marilyn Manson through articles in the press. I find some of the Marilyn Manson lyrics and some of the views associated with Marilyn Manson as reported in articles in the news and entertainment press offensive to our basic educational mission at Van Wert High School. Therefore, I believe that all of the Marilyn Manson t-shirts . . . are offensive to and inconsistent with our educational mission at Van Wert High School.

Furthermore, Clifton quotes some of the lyrics from Marilyn Manson songs that the School finds offensive, which include (but certainly are not limited to) lines such as, "you can kill yourself now because you're dead in my mind," "let's jump upon the sharp swords/and cut away our smiles/without the threat of death/there's no reason to live at all," and "Let's just kill everyone and let your god sort them out/Fuck it/Everybody's someone else's nigger/I know you are so am I/I wasn't born with enough middle fingers." The principal attested that those types of lyrics were contrary to the school mission and goal of establishing "a common core of values that include . . . human dignity and worth . . . self respect, and responsibility," and also the goal of instilling "into the students, an understanding and appreciation of the ideals of democracy and help them to be diligent and competent in the performance of their obligations as citizens."

Clifton also submitted to the district court magazine articles that portray Marilyn Manson as having a "pro-drug persona" and

articles wherein Marilyn Manson himself admits that he is a drug user and promotes drug use. Clifton concludes from his fourteen years of experience that children are genuinely influenced by the rock group and such propaganda.

Affidavits of other School officials support the administration's position that the Marilyn Manson T-shirts, generally speaking, were prohibited because they were "counter-productive and go against the educational mission of the Van Wert City School District community." Affidavit of John Basinger ¶ 5. See also Affidavit of David Froelich, ¶ 11 (stating view that the T-shirts are a distraction and are "contrary to our educational mission"); Affidavit of Rita Hurless, ¶ 5 (stating the School's conclusion that Marilyn Manson T-shirts "have no business in a school setting" and are "associated with values that are counterproductive and contrary to the educational mission of the Van Wert City School District"). The record is devoid of any evidence that the T-shirts, the "three-headed Jesus" T-shirt particularly, were perceived to express any particular political or religious viewpoint.

Under these circumstances, we find that the district court was correct in finding that the School did not act in a manifestly unreasonable manner in prohibiting the Marilyn Manson T-shirts pursuant to its dress code. The Supreme Court has held that the school board has the authority to determine "what manner of speech in the classroom or in school is inappropriate." *Fraser*, 478 U.S. at 683. The Court has determined that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission . . . even though the government could not censor similar speech outside the school.'" *Kuhlmeier*, 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 685). In this case, where Boroff's T-shirts contain symbols and words that promote values that are so patently contrary to the school's educational mission,

the School has the authority, under the circumstances of this case, to prohibit those T-shirts.

The dissent would find that the evidence was sufficient for a reasonable jury to infer that the School has engaged in "viewpoint discrimination" by prohibiting the T-shirts, similar to the armband prohibition in Tinker. The dissent primarily relies on one sentence in Principal Clifton's affidavit, in which Clifton stated that he found the "three-headed Jesus" T-shirt to be offensive because "it mocks a major religious figure." Under that reasoning, if a jury finds that the School has prohibited the T-shirts because of any viewpoint expressed on the shirts, then the School must show that it reasonably predicted that allowing the T-shirts would have caused a substantial disruption of, or material interference with, school activities. See *Tinker*, 393 U.S. at 509.

In our view, however, the evidence does not support an inference that the School intended to suppress the expression of Boroff's viewpoint, because of its religious implications. Rather, the record demonstrates that the School prohibited Boroff's Marilyn Manson T-shirts generally because this particular rock group promotes disruptive and demoralizing values which are inconsistent with and counter-productive to education. The dissenting judge agrees that "[i]f the only T-shirts at issue in this case were the ones that simply displayed illustrations of Marilyn Manson largely unadorned by text, the judgment of the district court might be sustainable." He reasons, however, that the one T-shirt featuring the distorted Jesus figure may have been prohibited because of the School's disagreement with its religious message. In our view, the School's treatment of the "three-headed Jesus" T-shirt and the others is not distinguishable. The record establishes that all of the T-shirts were banned in the same

manner for the same reasons--they were determined to be vulgar, offensive, and contrary to the educational mission of the school. See *Pyle v. South Hadley School Committee*, 861 F. Supp. 157, 159 (D. Mass. 1994) (upholding a prohibition on T-shirt proclaiming "See Dick drink. See Dick drive. See Dick die. Don't be a Dick." and "Coed Naked Band: Do It To The Rhythm.").

In sum, we are of the view that the School has the authority to prohibit Marilyn Manson T-shirts under these circumstances.

C. Fourteenth Amendment Claim

As for Boroff's Fourteenth Amendment claim, we do not believe that it was preserved for our review. Boroff suggests that the School's actions violated his right to "due process," but he does not discuss this claim at all in his brief on appeal. *Cf. Bush v. Dictaphone Corp.*, 161 F.3d 363, 370 (6th Cir. 1998) (noting that claims not pursued on appeal will typically be considered abandoned); *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) (holding that issues raised by an appellant in a perfunctory manner, unaccompanied by some effort at developed argumentation, are considered abandoned). In any event, Boroff is not claiming that the School utilized unfair procedures in prohibiting him from wearing Marilyn Manson T-shirts to school. We therefore have no need to consider a procedural due process argument.

Moreover, Boroff would have no cognizable substantive due process claim under the law of this circuit even if it had been properly preserved. See *Gfell v. Rickelman*, 441 F.2d 444, 446 (6th Cir. 1971) (rejecting the argument that "the freedom of choosing one's hair style is a fundamental right"); *Jackson v. Dorrier*, 424 F.2d 213, 218 (6th Cir.

1970) (per curiam) (rejecting the argument that high school students have a constitutionally protected privacy interest in being able to wear long hair to school). But see *Massie v. Henry*, 455 F.2d 779, 782 (4th Cir. 1972) (concluding that high school students have a liberty or privacy interest in governing their physical appearance in school); *Bishop v. Colaw*, 450 F.2d 1069, 1075 (8th Cir. 1971) (same); *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969) (same). In any event, the Supreme Court has repeatedly emphasized that substantive due process is not to be used as a fallback constitutional provision when another provision or amendment (in this case, the First Amendment) directly addresses the subject. *See Conn v. Gabbert*, 526 U.S. 286, 293 (1999) ("We have held that where another provision of the Constitution 'provides an explicit textual source of constitutional protection,' a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of 'substantive due process.'") (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

III. CONCLUSION

For the foregoing reasons and for the reasons stated in its opinion, we **AFFIRM** the decision of the district court.

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. Summary judgment is unquestionably a valuable means for avoiding unnecessary trials, *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252 (2d Cir. 1987), but it is usually inappropriate in civil rights cases when there are disputed and material questions about the reasonableness of an official's actions

or about an official's intent. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (concluding that state university regents were not entitled to summary judgment on the First Amendment claim of an untenured professor who had raised a genuine issue of material fact as to whether retaliation was the reason that his contract was not renewed); *Honore v. Douglas*, 833 F.2d 565, 569 (5th Cir. 1987) (observing that summary judgment is "an inadequate procedure for sorting out nebulous questions of motivation" in a First Amendment retaliation case); 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2732.2, pp. 153-54 & n.5, 176-77 & n.19 (3d ed. 1998) (noting that questions regarding the reasonableness of officials' actions in First Amendment cases may preclude the entry of summary judgment). Unlike the majority, I believe that a jury could reasonably find that the reason why School officials declared Boroff's Marilyn Manson T-shirts "offensive" was because the first Marilyn Manson T-shirt he wore contained a message about religion that they considered obnoxious. Accordingly, I believe that summary judgment in favor of the Board on Boroff's First Amendment claim was inappropriate, and therefore respectfully dissent.

I.

I have little doubt that school administrators may reasonably decide that certain rock performers are so closely identified with illegal drug use or other unlawful activities that T-shirts bearing their images are unacceptable for high school students to wear in school. See, e.g., *Williams v. Spencer*, 622 F.2d 1200, 1206 (4th Cir. 1980) (concluding that school officials could halt the distribution of an independent underground school newspaper that contained an advertisement for a store that sold drug paraphernalia). In fact, after the Supreme Court's

decisions in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), I suspect that forbidding a student from wearing a T-shirt simply because it makes a statement with which school administrators disagree is one of a very few decisions about student dress that school administrators are not allowed to make. Nevertheless, from the record presented, a reasonable jury could easily conclude that this was exactly what the School did.

I believe that the School in this case came perilously close to admitting that its decision to prohibit Boroff from wearing the three-headed Jesus T-shirt was made precisely because the School found the T-shirt's viewpoint repugnant. Principal Clifton explained in an affidavit that

> I have found the t-shirt which contains the three-faced Jesus to be offensive. . . . This t-shirt is offensive because it mocks a major religious figure. Mocking any religious figure is contrary to our educational missions which is to be respectful of others and others' beliefs. Second, mocking this particular religious figure is particularly offensive to a significant portion of our school community, including students, teachers, staff members and parents.

In view of this explanation, I am at a loss to understand how the majority can say that "[t]he record is devoid of any evidence that the T-shirts, the 'three-headed Jesus' T-shirt particularly, were perceived to express any particular political or religious viewpoint." Of course the three-headed Jesus T-shirt was perceived to express a political or religious viewpoint. Principal Clifton said so himself. It appears unmistakable that the reason why the three-headed Jesus

T-shirt was deemed "offensive" was because it said something about a venerated religious figure, and because many people in Van Wert (presumably including Principal Clifton) happen to disagree vehemently with what they perceived the T-shirt as saying. Indeed, from Principal Clifton's explanation, it would not be unreasonable to presume that if the T-shirt had depicted Jesus in a positive light, it would not have been considered "offensive."

Consistent with the Supreme Court's First Amendment jurisprudence, taking sides in that manner would be considered viewpoint discrimination, which is accompanied by an all-but-irrebuttable presumption of unconstitutionality. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29 (1995) (describing viewpoint discrimination as "an egregious form of content discrimination" and observing that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 61 (Brennan, J., dissenting) ("Once the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not."); *Bullfrog Films, Inc. v. Wick*, 646 F. Supp. 492, 505-06 (C.D. Cal. 1986) (observing that "regulations that discriminate on the basis of the content of speech" are generally not tolerated under the First Amendment, but that even when content-based regulation is permitted, "discrimination on the basis of

political or other views is never tolerated."), aff'd, 847 F.2d 502 (9th Cir. 1988).

II.

I also believe that the majority misapprehends the meaning of the terms "vulgar" and "offensive." In First Amendment cases, those terms refer to words and phrases that are themselves coarse and crude, regardless of whether one disagrees with the overall message that the speaker is trying to convey. Roughly speaking, they are the words and phrases that might have appeared on comedian George Carlin's list of words that one cannot say on the radio. See generally *FCC v. Pacifica Foundation*, 438 U.S. 726, 751-55 (1978) (reprinting Carlin's "Filthy Words" monologue). That is why the high school administrators in *Pyle v. South Hadley School Committee*, 861 F. Supp. 157, 159 (D. Mass. 1994), were allowed to prohibit a student from wearing a T-shirt proclaiming "See Dick Drink. See Dick die. Don't Be a Dick." See id. at 167-68 & nn. 8-9 (distinguishing *Tinker v. Des Moines Independent Community School Board*, 393 U.S. 503 (1969), because "[u]nlike *Tinker*, this is not a case about whether a particular viewpoint may be expressed."). The school administrators in *Pyle* were obviously not objecting to the message that drunk driving is bad and should be discouraged.

If Boroff had worn a T-shirt featuring Marilyn Manson's name and the song lyrics contained in the majority's opinion, this would be a very easy case. A number of those words are vulgar, regardless of whether one likes or dislikes Marilyn Manson's music or agrees or disagrees with whatever message Boroff would be trying to convey by wearing the shirt. But that sort of vulgarity is absent from the three-headed Jesus T-shirt that Boroff wore. This particular T-shirt was

found "offensive" because it expresses a viewpoint that many people personally find repellent, not because it is vulgar.

Censorship on that basis is simply not permitted in the absence of a reasonable prediction by school officials of substantial disruption of, or material interference with, school activities. Indeed, that was the holding of *Tinker*. See *Tinker*, 393 U.S. at 511 ("[S]chool officials cannot suppress expressions of feelings with which they do not wish to contend.") (citation and internal quotation marks omitted); Dambrot v. Central Michigan Univ., 839 F. Supp. 477, 484 (E.D. Mich. 1993) (concluding that a public university's "discriminatory harassment policy" that prohibited "symbols, [epithets,] or slogans that infer negative connotations about an individual's racial or ethnic affiliation," but permitted those that inferred positive or neutral connotations, was "as remarkable as it is illegal"), aff'd, 55 F.3d 1177 (6th Cir. 1994).

The majority asserts that "the School prohibited the Marilyn Manson T-shirts," including the three-headed Jesus T-shirt that precipitated this case, "because this particular rock group promotes disruptive and demoralizing values which are inconsistent with and counter-productive to education." It is not clear, however, what "disruptive and demoralizing values" the majority is referring to. If the majority is suggesting that the School could have concluded that Marilyn Manson's apparent endorsement of, say, illegal drug use, makes his picture an unacceptable image for students to wear in high school, I would agree. A fair reading of the record, however, suggests that the "disruptive and demoralizing values" that the School was really concerned about was disrespect for a specific venerated religious figure.

Or so a reasonable jury could have found. As noted above, however, school officials are not free to decide that only one side of a topic is open for discussion because the other side is too repugnant or demoralizing to listen to. See *Tinker*, 393 U.S. at 508 ("Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . .").

I also believe that the majority dropped its guard much too quickly at the School's conclusory invocation of "disruptive and demoralizing values." I am quite confident that the school officials in *Tinker* thought it would be highly disruptive and demoralizing--not to mention downright unpatriotic--for students to wear black armbands in order to protest a war in which thousands of American soldiers were fighting and dying. The Supreme Court nevertheless concluded that the officials could not prohibit the students from wearing the armbands in the absence of evidence that a ban would be necessary to prevent "material and subtantial interference with schoolwork or discipline." *Id.*

III.

This brings me to the last, but certainly not least important, matter on which I disagree with the majority. The majority apparently reads the Supreme Court's opinions in *Fraser* and *Kuhlmeier* as essentially overruling *Tinker*, concluding that after *Fraser* and *Kuhlmeier*, school officials can forbid whatever student speech they consider "offensive" (in the sense of promoting "disruptive and

demoralizing values"), as long as their decision does not appear "manifestly unreasonable."

That, however, is not what the Supreme Court held in either *Fraser* or *Kuhlmeier*. *Fraser* concluded that school officials could temporarily suspend a high school student who persisted in giving a speech permeated with obvious sexual metaphors during a school assembly, despite being warned that the speech was "inappropriate" and that delivering it might result in "severe consequences." *Kuhlmeier* concluded that high school administrators do not offend the First Amendment by exercising editorial control over the style and content of school-sponsored publications as long as their actions are reasonably related to legitimate pedagogical concerns.

Because nothing in either *Fraser* or *Kuhlmeier* purports to overrule *Tinker* (indeed, *Tinker* was recently cited with approval by the Supreme Court in *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1888 (2000)), I believe that it should be left to the Supreme Court to determine whether and when *Tinker* should be cast by the wayside. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (cautioning the lower courts to accord the Supreme Court "the prerogative of overruling its own decisions."); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 486 (1989) (Stevens, J., dissenting) (describing as "an indefensible brand of judicial activism" the refusal of lower courts to apply controlling Supreme Court precedent based upon a prediction that the Supreme Court would abandon its prior holding).

Instead, in both *Fraser* and *Kuhlmeier*, the Supreme Court distinguished *Tinker* by noting that the school officials in the latter cases might reasonably have been thought to be endorsing or

condoning the student expression at issue had they taken no action. In *Fraser*, the student campaign speech at issue occurred at an assembly during school hours that students were expected to attend. See *Fraser*, 478 U.S. at 677 (noting that the students were required to attend the assembly or report to study hall). (Fraser's speech was also vulgar.) Kuhlmeier involved a student newspaper that was funded and sponsored by the school itself. See *Kuhlmeier*, 484 U.S. at 271 ("[A] school may in its capacity as publisher of a school newspaper or producer of a school play 'disassociate itself' not only from speech that would 'substantially interfere with [its] work . . . or impinge upon the rights of other students,' but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.") (second alteration in original) (quoting *Fraser*, 478 U.S. at 685; *Tinker*, 393 U.S. at 509). This distinction was critical to both the *Fraser* and *Kuhlmeier* decisions.

In contrast, I do not believe that school officials can reasonably be thought to endorse or condone a message worn on a student's T-shirt simply because they do not prohibit the student from wearing the T-shirt to school. See *Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (plurality) ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support speech that it merely permits on a nondiscriminatory basis. . . . The proposition that schools do not endorse everything they fail to censor is not complicated.") (citations omitted).

IV.

In sum, the Supreme Court's First Amendment jurisprudence prohibits school officials from telling a student that he cannot wear a particular T-shirt simply because they perceive that the T-shirt is communicating a message with which they disagree. Because I believe that a reasonable jury could conclude that this is exactly what the School did in the present case, I respectfully dissent from the majority's decision to affirm the grant of summary judgment in favor of the School on Boroff's First Amendment claim. I would therefore reverse the judgment of the district court to the extent that it entered summary judgment for the School on this claim, and remand the case for trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ELLEN S. BOROFF, *etc.*,

Case No.

3:97 CV 7622

Plaintiff,

-vs-

MEMORANDUM OPINION

(Resolves Doc.Nos. 22 & 25)

VAN WERT CITY BOARD OF
EDUCATION, *et al.*,

Defendants.

KATZ, J.

This matter is before the Court on cross motions for summary judgment. For the follwoing reasons, Plaintiff's motion will be denied. Defendants' motion will be granted.

I. Background

Plaintiff Ellen S. Boroff, as guardian and next friend of Nicholas J. Boroff, brings this action to challenge the actions of Defendants Van Wert City Board of Education, School Superintendent John Basinger, Principal William Clifton, and Principal's Chief Aide David Froelich in forbidding Nicholas J. Boroff, a student at Van Wert

High School, to wear his "Marilyn Manson" T-shirts on school grounds.

The Van Wert High School ("the School") has a dress code which provides that "clothing with offensive illustrations. . .[is] not acceptable. . .School officials reserve the right to make recommendations for changes in the dress and grooming of students. Any class time missed because of dress code problems will be counted as unexcused."

On August 29, 1997, Nicholas Boroff came to school wearing a T-shirt for the rock music group "Marilyn Manson," with a picture of a three-faced Jesus Christ, and the words "See No Truth, Hear No Truth, Speak No Truth." David Froelich told Nicholas the T-shirt was offensive, and that he must turn it inside out, go home and change, or leave and be truant. Nicholas left school and did not return that day.

On September 4, 5, 8, and 9, 1997, Nicholas attempted to wear different "Marilyn Manson" T-shirts to school. In each case, he was told that he could not wear a "Marilyn Manson" T-shirt because the shirt was offensive. The three Defendant school officials met with Ellen and Nicholas Boroff on September 4, 1997 and told the Boroffs that "Marilyn Manson" T-shirts were not allowed on school grounds.[2]

Nicholas did not attend school on September 10, 11, 12, and 15, 1997. On September 16, 1997, Plaintiff filed this action, claiming that the School's prohibition on "Marilyn Manson" T-shirts violates the First Amendment. On September 19, 1997, this Court heard

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[2]The dates listed above account for every day of the Fall, 1997 semester that school was in session prior to the date on which Plaintiff filed this suit.

argument on Plaintiff's motion for a temporary restraining order and preliminary injunction requiring the School to permit Nicholas to wear "Marilyn Manson" T-shirts to school. That motion was denied, on the ground that the School's prohibition on hte "Marilyn Manson" T-shirts was a legitimate exercise of its authority to maintain discipline in the school setting. The matter is now before the Court on cross motions for summary judgment.

II. Discussion

A. *Summary Judgment Standard*

As an initial matter, the Court sets forth the relative burdens of the parties once a motion for summary judgment is made. Summary judgemnt must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 191 L.Ed.2d 265 (1986). Of course, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323, 106 S.Ct. at 2553. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2541, 91 L.Ed.2d 202 (1986) (*quoting* Fed. R. Civ. P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or meerely

reassert its previous allegations. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

B. Propriety of the School's Conduct

The first issue before the Court is a purely legal question: whether a school district may prohibit a student from wearing a T-shirt that is offensive, but no obscene, on school grounds, where the T-shirt has not been shown to cause a substantial disruption of the academic program. If so, the Court must determine whether the actions of the Defendants in this case were justified.

In addressing these issues, the Court is guided by the reasoning of three leading Supreme Court cases: *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), and by subsequent lower federal court cases construing those opinions in the context of school dress codes and other restrictions on student expression that school authorities have deemed necessary to good order and effective instruction on school premises.

In *Tinker*, the Supreme Court addressed the issue of students' free speech rights in the context of nondisruptive expressive activity, not sponsored by the school, that was banned solely on the basis of its content. The *Tinker* plaintiffs were a group of students who desired to wear black armbands as a protest against the Vietnam war. The armbands displayed no vulgar or offensive message; there was no indication that the work of the school or any class was disrupted; and other students in the school were permitted to wear buttons and other symbols displaying politically controversial messages. The wearing of the symbols expressing opposition to the Vietnam war was singled out for prohibition.

In holding that the defendant school district could not single out expression of opposition to the Vietnam war for prohibition in the absence of any record evidence that the students' armbands were disrupting the school, the Court held that students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506, 89 S.Ct. at 736. In so doing, the Court expressly distinguished its determination as to the wearing of armbands - which activity "involves direct, primary First Amendment rights akin to 'pure speech'" - from school rules merely regulating "the length of skirts or the type of clothing. . .hair style, or deportment." *Id.* at 507-08, 89 S.Ct. at 737. At the same time, the Court held that the students' rights to express their opinions on school grounds were protected by the First Amendment only when the students expressed those opinions "without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Id.* at 513, 89 S.Ct. at 740 (citation omitted).

Fraser addressed the issue of students' free speech rights where the plaintiff had delivered a speech containing an explicit sexual metaphor before a school-sponsored student assembly. Thus, two factors distinguished *Fraser* from *Tinker*: that the speech was offensive; and that the speech was school-sponsored. In holding that the school could sanction the student for using the offensive metaphor, the Supreme Court rested firmly on the first of the two distinguishing factors. They stated that the political armbands worn in *Tinker* were distinguishable from the sexual content of Fraser's message because *Tinker* "did not concern speech or action that intrudes upon the work of the schools or the rights of other students," 478 U.S. at 680, 106 S.Ct. at 3163 (quoting *Tinker*, 393 U.S. at 508, 89 S.Ct. at 737), and because "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior," *id.* at 681, 106 S.Ct. at 3163. They held:

> The First Amendment guarantees wide freedom in matters of adult public discourse. . . .It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. In *New Jersey v. T.L.O.*, we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. As cogently expressed by Judge Newman, "the First Amendment gives a high school

> student the classroom right to wear Tinker's armband, but not Cohen's jacket."[3]
>
> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers-and indeed the older students-demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

Id. at 682-83, 106 S.Ct. at 3164 (citations omitted).

Kuhlmeier addressed the issue of students' free speech rights in the context of school-sponsored activities where the speech was not inherently offensive, and held that school officials have far greater latitude in restricting students' nondisruptive pure speech where the speech can be seen as having the imprimatur of the school. In *Kuhlmeier*, the Supreme Court held that a school did not violate the rights of three student newspaper editors when it deleted two pages of articles from a high school newspaper. While recognizing that public school students "do not shed their constitutional rights to freedom of

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[3] *See Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

speech or expression at the schoolhouse gate," the Court stated that the students' First Amendment rights "must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school." 484 U.S. at 266, 18 S.Ct. at 567 (citations omitted).[4]

Thus, controlling Supreme Court precedent sets forth three rules governing the appropriate balance between high school students' First Amendment rights, and the schools' need to foster an educational atmosphere free from undue disruptions to appropriate discipline. First, under *Tinker*, speech that is neither vulgar nor school-sponsored may be prohibited only if it causes a substantial and material disruption of the school's operation. Second, under *Fraser*, vulgar or offensive speech may be prohibited without making a showing of disruption or substantial interference with the school's work. Third, under *Kuhlmeier*, school-sponsored speech may be restricted when the limitation is reasonably related to legitimate educational concerns.

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[4]The reasoning behind the rule was explained succintly by the Fifth Circuit in *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960, 968-69 (5th Cir. 1972):

> Because high school students and teachers cannot easily disassociate themselves from expressions directed towards them on school property and during school hours, becasue disciplinary problems in such a populated and concentrated setting seriously sap educational processes, and because high school teachers and administrators have the vital responsibility of compressing a variety of subjects and activities into a relatively confined period of time and space, the exercise of rights of expression in the high schools, whether by students or by others, is subject to reasonable constraints more restrictive than those constraints that can normally limit First Amendment freedoms.

Chandler v. McMinnville Sch Dist., 978 F.2d 524, 529 (9th Cir. 1992); *Pyle v. South Hadley Sch. Comm.*, 861 F.Supp. 157, 166 (D. Mass. 1994); *question certified*, 55 F.3d 20 (1st Cir. 1995), *decision aborgated on state law grounds*, 667 N.E.2d 869 (Mass. 1996). The Court, therefore, answers the first question presented in this case in the affirmative. A school district may prohibit a student from wearing a T-shirt that is offensive, but not obscene, on school grounds, even if the T-shirt has not been shown to cause a substantial disruption of the academic program.[5]

Having so determined, the Court proceeds to address the second issue: whether the actions of the Defendants in this case were justified. The School has broad discretion to decide what constitutes an "offensive" T-shirt. Federal Courts applying *Tinker* and *Fraser* have given great deference to local school administrators' determinations of whether a given article of clothing may be prohibited on school grounds, even in cases where the clothing at issue arguably was only mildly offensive. *See, e.g., Pyle v. South Hadley Sch. Comm.*, 861 F.Supp. 157 (D. Mass. 1994) (upholding a prohibition on T-shirts proclaiming, "See Dick drink. See Dick drive. See Dick die. Don't be a Dick." and "Coed Naked Band: Do It To The Rhythm."); *Broussard v. School Bd.*, 801 F.Supp. 1526 (E.D. Va. 1992) (upholding a prohibition on T-shirt proclaiming "Drugs Suck."); *Gano v. School Dist. No. 411*, 674 F.Supp. 796 (D.Idaho 1987) (upholding a prohibition on T-shirt falsely depicting school administrator in

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[5]Defendants argue, as an alternative basis for holding in their favor, that the T-shirts at issue did disrupt the academic environment. Plaintiff disputes this contention. Since the Court will enter summary judgment in Defendants' favor, it must resolve all factual disputes in Plaintiff's favor, and assume for purposes of this motion that there was no disruption to the School.

alcoholic stupor); *Harper v. Edgewood Bd. of Educ.*, 655 F.Supp. 1353 (E.D. Ohio 1987) (upholding a prohibition on cross-dressing at a high school prom);[6] *compare Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F.Supp. 1459 (C.D. Cal. 1993) (broad prohibition on wearing college or sports team logos could be upheld only on a showing that such clothing could disrupt or disturb school activities). The Supreme Court has held that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Kuhlmeier*, 484 U.S. at 273, 108 S.Ct. at 571. Thus, the Court gives significant deference to the judgment of the citizens of the community, through their elected representatives on the school board and the school administrators appointed by them. The Court's does not substitute its judgemnt for that of the school administrators; the inquiry is limited to a determination that the administrators' decision was not manifestly unreasonable. *See Pyle*, 861 F.Supp. at 159.

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[6]Other District Courts have upheld similar dress code provisions under different reasoning, holding that the wearing of a particular type of clothing is not expressive conduct, and a studnet's desire to dress in a certain way at school does not implicate First Amendment concerns at all. *See, e.g., Bivens v. Albuquerque Pub. Schs.* 899 F.Supp. 556 (D.N.M. 1995) (dress code prohibiting saggy pants did not violate student's First Amendment rights); *Oleson v. Board of Educ.*, 676 F.Supp. 820 (N.D. Ill. 1987) (dress code prohibiting male students from wearing earrings did not violate student's First Amendment rights). The Sixth Circuit has adopted that reasoning with regard to school-imposed restrictions on hair length, *Gfell v. Rickelman*, 441 F.2d 444 (6th Cir. 1971), but has not addressed the argument with regard to school clothing. For purposes of these motions, the Court assumes, without deciding, that Nicholas' T-shirts constitute expressive conduct because they convey, among other possibilities, the particularized message that he likes the rock group Marilyn Manson.

Plaintiff argues that the School's decision was manifestly unreasonable in this instance. She argues, *inter alia*, that the "Marilyn Manson" T-shirts prohibited by the School are materially indistinguishable from T-shirts for other hard rock groups that are regularly worn on campus. Plaintiff has submitted photographs of students wearing T-shirts for rock groups and musicians including Black Sabbath, the Grateful Dead, Insane Clown Posse, Led Zeppelin, Nine Inch Nails, Nirvana, Ozzy Osbourne, and Pink Floyd. The Court disagrees with Plaintiff's contention that it is manifestly unreasonable to distinguish Marilyn Manson from Pink Floyd. Although the music of all of the aforementioned rock groups is marked by a hard, driving beat and lyrics that are frequently antiestablishment, it was not manifestly unreasonable for the School to determine that Marilyn Manson's overt ties to Satanism, violence and drug use rendered that group the worst of the lot, and justified banning T-shirts that overtly referred to Marilyn Manson.

Plaintiff also argues that the School's decision was manifestly unreasonable becaue several of Nicholas' T-shirts contain no material that is in itself objectionable, apart from the reference to Marilyn Manson. She argues that a viewer who was unfamiliar with Marilyn Manson's music and general reputation would not find those T-shirts offensive. The Court disagrees. First, several of the T-shirts at issue are offensive even if the viewer is totally unfamiliar with Marilyn Manson. Second, even as to the T-shirts that contain nothing except Marilyn Manson's logo and/or photograph, the Court disagrees with Plaintiff's premise that the School must disregard the cultural capital of the students with whom Nicholas would daily come into contact. The meaning of all symbolic communication is affected by the socio-cultural background and knowledge the audience brings to the scene. While it may be true that an individual who was totally

unfamiliar with Marilyn Manson would not be offended by merely seeing the group's name, it is equally true that an individual who was unfamiliar with the appearance of marijuana plants might easily mistake a "marijuana-leaf" T-shirt for one containing an unobjectionable picture of a buckeye, and a reader who was unfamiliar with Chaucer would be unlikely to find the phrase "a maid hath not a beard"[7] risque. The Court cannot hold that a message is inoffensive merely because it might not be understood by the uninitiate. The meanings of symbolic communications must be construed in accordance with the background knowledge the recipients of the communications are likely to bring to them. In the context of this case, it was not manifestly unreasonable for School officials to determine that a significant proportion of high school students would likely be familiar with Marilyn Manson's music and general reputation, and would ascribe meaning to Nicholas' "Marilyn Manson" T-shirts based on that knowledge.

Plaintiff also argues that the School's conduct was manifestly unreasonable because the anti-Marilyn Manson rule was not consistently enforced. Specifically, she claims that another student, Libbey Johnson, regularly brought a backpack with three "Marilyn Manson" patches on it to school and was not disciplined. The record indicates nothing about hte amount of time the backpack spent in Ligbbey's locker or unobtrusively placed on the floor. Although Plaintiff does not specifically mention it, th Court notes that at least two of the T-shirts in the photographs submitted by Plaintiff - one with a picture of a marijuana leaf and one with the designation "Big Johnson" - appear to violate the School dress code. The record does

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[7]GEOFFREY CHAUCER, THE CANTERBURY TALES, THE MILLER'S TALE.

not indicate that the students openly wore the offending T-shirts thoughout the school day, and the boy wearing the "Big Johnson" T-shirt is also wearing a flannel shirt that may have been used to cover his T-shirt. Even if the Court accepts Plaintiff's contention that the dress code was not enforced against all violators, however, that circumstance does not mandate a finding that the School cannot enforce an otherwise legal dress code. Schools simply do not have the manpower to catch all dress code violators.

The Court has reviewed the photographs of the T-shirts at issue in this case. The School administrators' decision that "Marilyn Manson" T-shirts are offensive was not manifestly unreasonable. Therefore, Defendants were justified in prohibiting Nicholas from wearing the T-shirts.

III. Conclusion

For the foregoing reasons, Plaintiff's motion for summary judgment is denied. Defendants' motion for summary judgment is granted.

IT IS SO ORDERED.

DAVID A. KATZ
U.S. DISTRICT JUDGE

1. The front is a rather macabre picture of Marilyn Manson, with the words "Marilyn Manson" at the bottom.

The back reads, "How does it feel to be one of the beautiful people?"

2. The front is a ghoulish picture of Marilyn Manson, with the words "Marilyn Manson" at the bottom.

The back reads, "Sweet Dreams are made of this."
All the letters on this shirt are cursive.

3. The front has a downright ghastly picture of Marilyn Manson, framed at the top by "Marilyn" and at the bottom by "Manson."

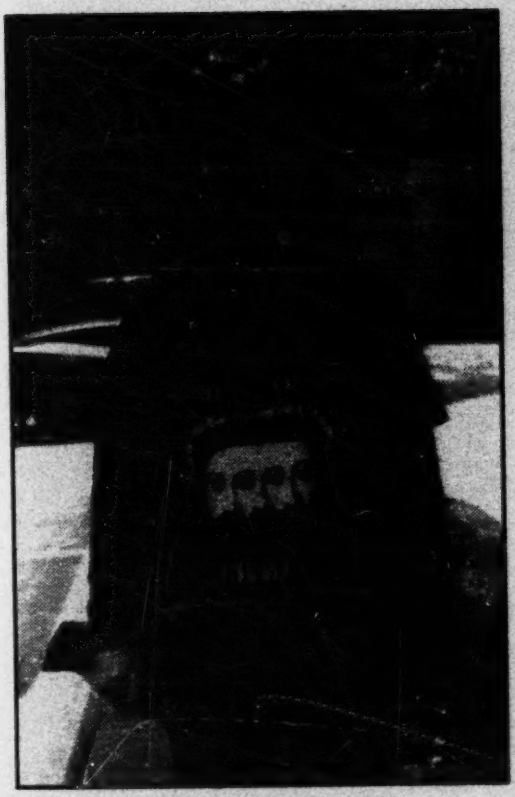
The back a large white fist, with the index and pinkie fingers extended, and the words "Marilyn Manson" at the bottom.
All the letters on this shirt are done as might be on a horror comic book.

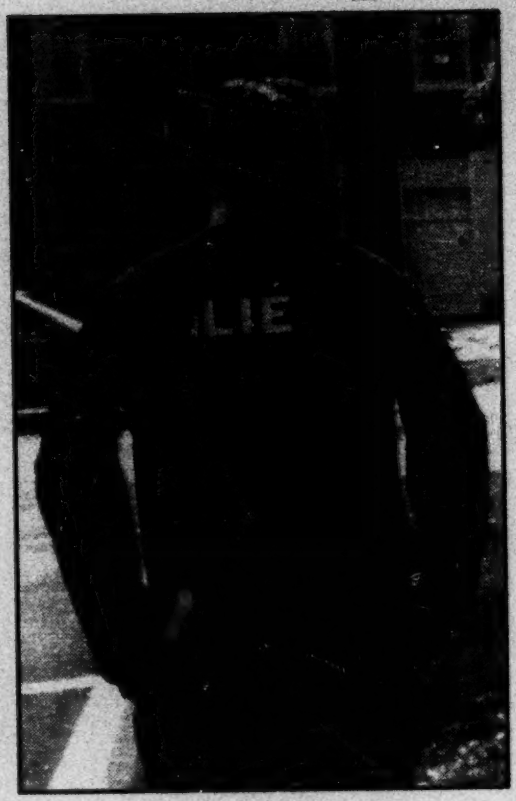
4. The front has a picture of a smiling Marilyn Manson, with the words "Marilyn Manson" near the top.

The back is blank.

5. The front has a ghoulish partial picture of Marilyn Manson, with the words "Marilyn Manson" near the top.

The back has a circle on it, with marks on the outside at the quadrant points. Each of these points has a number and a word: "1. heart", "2. mischief", "3. complacent", "4. malice."

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